

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**WESLEY S. PATTON**  
Claimant

VS.

**FLOWERVE CORPORATION**  
Respondent

AND

**TRAVELERS PROPERTY CASUALTY  
CO. OF AMERICA**  
Insurance Carrier

Docket No. 1,026,488

**ORDER**

Respondent and its insurance carrier (respondent) requested review of the April 5, 2006, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**ISSUES**

The Administrative Law Judge (ALJ) found that on or about October 28, 2005, claimant aggravated a preexisting back condition while working for respondent. Thereafter, claimant continued to work and perform his strenuous job duties, and his condition worsened. The ALJ also found that claimant timely notified respondent about his injuries. Accordingly, the ALJ ordered respondent to submit a list of three physicians so that claimant can select one to be the authorized treating physician for treatment, tests, and referrals, except referrals to rehabilitation hospitals. The ALJ also found that claimant is entitled to temporary total disability compensation at the rate of \$423.90 per week beginning November 7, 2005, and continuing thereafter until claimant is released to substantial and gainful employment.

Respondent argues that there is no medical evidence which establishes that claimant's present back problems are the result of a work-related injury. Respondent asserts that since claimant admitted he had back symptoms whether or not he was working, his testimony alone is not enough to sustain his burden of proving that he sustained personal injury by accident arising out of and in the course of his employment.

Although notice was listed as an issue in respondent's Request for Review, respondent, in its brief to the Board, states that for the purposes of this appeal, it is only challenging the ALJ's finding that claimant sustained a work-related injury.

Claimant admits that he had a preexisting back condition. However, claimant contends that the evidence shows that it is more probably true than not true that he suffered a new injury on October 27, 2005, and each day worked thereafter which aggravated his preexisting condition.<sup>1</sup> Claimant also contends that he gave notice to his supervisor that he injured his back on the day of the injury. Accordingly, claimant requests that the preliminary hearing Order of the ALJ be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant worked as a leak seal technician for respondent. He began as a temporary employee in June 2005 and was hired as a permanent employee on August 29, 2005. On October 27, 2005, he traveled to Tulsa to deliver a piece of equipment called a split T. While lifting the split T, he felt pain going down the back of his leg and muscle pain and a spasm in his back. Claimant continued to work the rest of the day. He said he told his supervisor, Wayne Watts, that he had lifted the split T and that had caused him to aggravate his back condition. However, he said it was not a formal complaint but was just shop talk, that he was finishing the day and mentioned that he had aggravated his back. He also stated that he told Scott Stewart, respondent's branch manager, about the incident the day after it happened.

Mr. Watts testified that claimant told him "that he thought he did something to his back delivering that fitting"<sup>2</sup> but could not remember what day that conversation occurred. He thought it was on a day that claimant did not show up for work, and he and claimant talked about claimant's back.

Claimant continued working for respondent after the October 27 incident. His last day was November 6. On November 7, claimant went to the hospital to request an epidural injection. A day later, he was hospitalized for a condition that claimant said is not related to his work at respondent.

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<sup>1</sup> Form K-WC E-1 Application for Hearing filed November 23, 2005, alleges the date of accident as "[o]n or about October 24, 2005." At the January 12, 2006, Preliminary Hearing, claimant described his injury as occurring on October 25, 2005. Respondent's records showed delivery of the split T was on October 27, 2005.

<sup>2</sup>Watts Depo. at 14.

Scott Stewart testified that he did not know that claimant was having any problems with his back in September or October 2005. The first he knew about claimant having a back condition was on November 6 or 7, when claimant did not show up to work. Then, on November 8, he received a text message from claimant stating that he was in the hospital. He went to visit claimant on November 11 and told claimant that respondent had suspended him. At that time, claimant told him that he had hurt his back, but Mr. Stewart did not remember that claimant told him it was work related at that point. Some time later, claimant went to Mr. Stewart to ask him to pull some paperwork to find out what day the delivery of the split T had been made. That was the first time Mr. Stewart became aware that claimant was claiming a work-related injury.

The records of Dr. H. Richard Kuhns and Dr. Scott Jahnke were admitted and show that claimant had frequently complained of his back condition for several years before this incident. Claimant admits that he had a preexisting back condition. He had a lumbar discectomy in 1998, which was not work related. He had a spinal scope in 2000. He also had a lumbar laminectomy in November 2001, which was the result of a work-related injury. He also had surgery on his low back on April 20, 2005. Claimant said he had been released with no restrictions after his April 2005 surgery before he started working for respondent. Claimant has an apparent addiction to narcotic pain relievers and has been in treatment for that addiction.

Claimant also has a history of having epidural injections. He described his receipt of these injections in the following testimony:

Q. (by respondent's attorney) As I am looking at Dr. Kuhns' notes of October 31st, it says that he talked with an anesthetist about repeating the epidural but you had had three in the last three months. Is that correct?

A. I don't recall three in three months. I had had a few of them. I routinely do that anyway, whether I am significantly hurt or not. It takes any kind of aggravation away. Those epidurals being done are nothing out of the ordinary for me.

Q. Let me understand that a little bit better. You will routinely get an epidural. Why is that?

A. Just for the swelling and inflammation in the back, and it puts pressure on my nerve root. That cortisone draws the swelling down.

Q. Do you do that for work-related purposes? I don't understand. You will go in and ask the doctor to give you an epidural?

A. Yeah.

Q. For just a routine basis?

A. Yeah. When my back starts getting aggravated and I feel it is getting worse, I will go get an epidural.

Q. Had you had any of those epidurals when you worked as a Flowserve employee?

A. I am sure I probably had one when I was under Flowserve's employment.

Q. Did you ever tell your supervisors that you were getting epidurals while you were an employee at Flowserve?

A. Yes, I did. They had to work around my work schedule to accommodate that.

Q. Did you tell them they were related to work?

A. No.

Q. Did you think they were related to work?

A. I mean I can have the back symptoms whether I am working or not. It doesn't take physical labor for me to have those symptoms. They knew a lot of work aggravated it. I mean it was—nothing was ever said about the motive behind the epidurals.<sup>3</sup>

On October 31, claimant went to see Dr. Kuhns. Dr. Kuhns' records do not indicate that claimant complained about hurting his back while lifting but indicated that he had been working up to 80 hours per week. Dr. Kuhns talked to an anesthetist about referring claimant for an epidural injection, but the anesthetist was uncomfortable doing that since claimant had three epidural injections in the last three months. Dr. Kuhns' gave claimant a prescription for pain medication. On November 16, 2005, claimant again saw Dr. Kuhns and told him that he had taken some Percocet given to him by his sister. Dr. Kuhns then resigned as claimant's personal physician because claimant's actions were a violation of a verbal and written contract they had that claimant would only take medications prescribed by him.

Claimant still has shooting pain down the back of his left leg and a lot of muscle spasms. His condition has continued to worsen. He has been to see Dr. Abay, who recommended a myelogram.

No physician has said whether claimant's present condition is or is not work related. The record is devoid of any expert medical causation opinion. Claimant attributes his recent flare-up in symptoms to a lifting incident on October 27, 2005, but he continued

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<sup>3</sup>P.H. Trans. at 19-21.

working after that incident. When he did seek medical treatment, claimant did not tell the physician about the October 27 incident. In fact, claimant described getting epidural injections for back pain as routine and often unrelated to any acute injury or activity. The same can be said for his use of pain medications. Nevertheless, Mr. Watts recalls claimant mentioning suffering a back injury when delivering the fitting, although Mr. Stewart does not. The ALJ apparently found claimant to be a credible witness because she awarded benefits primarily on the strength of claimant's testimony. Generally, the Board gives some deference to an ALJ's determination of credibility where she had the opportunity to observe the witnesses testify. Here, only claimant's testimony was presented live to the ALJ. The testimony of Mr. Watts and Mr. Stewart were taken by deposition, and the medical evidence is all in the form of records and written reports. Furthermore, although claimant testified before the ALJ on January 12, 2006, the preliminary hearing order was not issued until April 5, 2006. Accordingly, the Board is in nearly the same position as the ALJ concerning this record.

In October 2005, claimant was receiving ongoing treatment for his preexisting back problems. He was clearly symptomatic before the alleged October 27 lifting incident. Based on the record presented to date, claimant has failed to prove that his present back problems are due to any accident or accidents at work with the respondent.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 5, 2006, is reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2006.

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant  
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director